No. 16035

In the United States Court of Appeals for the Ninth Circuit

RALPH C. GRANQUIST, District Director of Internal Revenue for the District of Oregon, APPELLANT

v.

MARGARET HACKLEMAN, APPELLEE

On Appeal From The Judgment Of The United States District Court For The District Of Oregon

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BRIEF FOR THE APPELLANT

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BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the District Court (R. 11-19), rendered on the Director's motion to dismiss, is reported at 147 F. Supp. 826. The District Court rendered no opinion in granting judgment.

JURISDICTION

This proceeding is based on a complaint and supporting affidavit (R. 3-6) filed in the District Court of Oregon on September 17, 1956, and an amended complaint (R. 8-10) filed on October 15, 1956; the

prayers of which were, in substance, that the District Court permanently enjoin the collection of amounts assessed against the appellee and the Estate of Abe Hackleman, deceased, of which she is executrix, as penalties for the late filing of income tax returns for the years 1953 and 1954, and declare such assessments null and void. Jurisdiction of the District Court apparently was sought to be invoked under Section 6213 of the Internal Revenue Code of 1954 (R. 3, 8) and 28 U.S.C., Section 1346 (referred to as "Section 1346, Title 26, U.S.C.A." (R. 8)). The District Director of Internal Revenue, appellant herein, moved to dismiss the action for lack of jurisdiction on the ground that it was an action to enjoin the collection of internal revenue taxes, the maintenance of which is expressly prohibited by Section 7421(a) of the Internal Revenue Code of 1954. (R. 11.) Under date of January 7, 1957, the District Court entered an opinion on the Director's motion to dismiss (R. 11-19), and on January 14, 1957, entered an order (R. 20-21) denying the motion to dismiss, restraining the collection of the penalties in issue until further order, and allowing the District Director 30 days within which to answer the complaint on the merits or submit to the prayer thereof. The District Director filed an answer to the complaint (R. 21-23) on April 12, 1957, again asserting lack of jurisdiction in the court below to grant the relief prayed for. Motions for summary judgment were filed by the appellee on October 18, 1957 (R. 24-25), and by the District Director on October 25, 1957 (R. 25-26). A judgment granting appellee the

relief prayed for was entered by the District Court on January 13, 1958 (R. 26-28), and notice of appeal was filed by the District Director on February 27, 1958 (R. 28). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether delinquency penalties, imposed under Sections 291(a) of the Internal Revenue Code of 1939 and 6651(a) of the Internal Revenue Code of 1954 for the late filing of income tax returns, may be assessed and collected, as are the self-returned taxes reported upon such returns, without the prior issuance of ninety-day deficiency letters.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Codes of 1939 and 1954 and Treasury Regulations are printed in the Appendix, *infra.*

STATEMENT

The facts are essentially not in dispute, as appears from the pleadings (amended complaint (R. 8-10); answer (R. 21-23)).

The appellee, Margaret Hackleman, is executrix of the Estate of Abe Hackleman, deceased.[1] On June 5, 1956, she filed with the appellant, District Director of Internal Revenue for the District of Oregon income tax returns for herself for 1953 and 1954 and for the Estate of Abe Hackleman for 1953 and 1954, and

[1] The date of death is not shown.

paid the taxes and interest due thereon. (R. 8, 21.)

On or about June 6, 1956, there was assessed against Abe and Margaret Hackleman, because of a mathematical error in their return for that year, additional income taxes for the year 1953 in the sum of $180.34, together with interest in the sum of $28.76, and a penalty for late filing of the return for that year in the sum of $346.16; and on or about the same date there was assessed against the Estate of Abe Hackleman, because of a mathematical error in the return for that year, additional income taxes for the year 1953 [2] in the sum of $120.35, together with interest in the sum of $22.85, and a penalty for late filing of the return in the sum of $476.31. These assessments for 1953 were not jeopardy assessments, and statutory notices of deficiency required by Section 272(a) of the Internal Revenue Code of 1939 were not issued prior to the making of the assessments.[3] (R. 8, 9, 22.)

Also, on or about June 6, 1956, there was assessed against Margaret Hackleman for the year 1954 an addition to the tax for that year in the sum of $578.49, as provided by Section 6651 of the Internal Revenue Code of 1954, for the late filing of her return for that year; and on or about the same date there was assessed against the Estate of Abe Hackleman for the year 1954 an addition to the tax for that

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[2] The allegations of paragraphs IV and V of the complaint (R. 8, 9) indicate that Abe Hackleman died in 1953 and that the appellee filed a joint return for herself and him for that year and also a return for the estate.

[3] The additional income taxes and interest assessed for 1953 due to mathematical errors in the returns are not in issue in this proceeding—only the penalties for late filing.

year in the sum of $663.90, as provided by Section 6651 of the 1954 Code, for the late filing of the return for that year. These assessments for 1954 were not jeopardy assessments, and statutory notices of deficiency required by Section 6212 [4] of the 1954 Code were not issued prior to the making of the assessments. (R. 9, 10, 22.)

The present action is to enjoin collection of the above amounts assessed as penalties for late filing of returns, and to invalidate the assessments for these penalties, on the ground that statutory deficiency notices were not issued prior to the making of the assessments. The District Court entered summary judgment granting the relief prayed for (R. 26-28), and the Director appealed (R. 28).

STATEMENT OF POINT TO BE URGED

The District Court erred in concluding that the assessment of delinquency penalties under Section 291(a) of the Internal Revenue Code of 1939 and under Section 6651(a) of the Internal Revenue Code of 1954 is subject to the restrictions upon assessment of deficiencies in income tax provided by Section 272(a) of the Internal Revenue Code of 1939 and Section 6213 of the Internal Revenue Code of 1954. (R. 34.)

SUMMARY OF ARGUMENT

This is an action to enjoin the collection of delinquency penalties assessed in connection with the late

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[4] Erroneously alleged as Section 6213 in the complaint. (R. 10.)

filing of federal income tax returns for the years 1953 and 1954. An action to restrain the assessment and collection of federal taxes will lie only in the case of exceptional and unusual circumstances or where specifically by authorized statute, and the same rule is applicable to civil penalties assessed in connection with such taxes. The instant case presents no exceptional and unusual circumstances upon which equity jurisdiction may be founded, and this action will lie only if the penalties in issue are "deficiencies" within the meaning of applicable provisions of the Internal Revenue Codes of 1939 and 1954.

The Board of Tax Appeals, now the Tax Court, was created as a forum where taxpayers may litigate their liability for deficiencies in federal income, estate, and gift taxes before being required to pay them, and the term "deficiency" has been defined in the various internal revenue statutes dealing with the subject to delimit the jurisdiction of the Tax Court in such matters. The term has reference to *taxes* imposed by the various statutes. In essence, a "deficiency", as variously defined by the statutes, is the excess of the amount determined by the Commissioner to be the correct amount of *tax* due by the taxpayer over the amount reported by him on his return; and if no return is filed, or no amount is reported on the return as tax due, then the amount determined by the Commissioner to be the correct amount of *tax* due is a "deficiency". If a "deficiency" in *tax* is determined by the Commissioner the Tax Court may have jurisdiction, upon a timely appeal to it, to adjudicate all issues, including penalties, relating to the taxpayer's

liability for the year for which the "deficiency" in *tax* is determined by the Commissioner. But delinquency penalties are not "deficiencies" within the meaning of the applicable statutes.

The District Court has confused "deficiencies" in *tax* with civil sanctions which are imposed under the several statutes as *additions to* the tax, and which are to be assessed, collected, and paid at the same time, as a part of, and subject to the same conditions and limitations as the tax with respect to which they are imposed. The delinquency penalties involved in this case for 1953 were assessed under Section 291(a) of the 1939 Code, which provides that such penalties "shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax." The taxes on which these penalties were computed were the original taxes shown on the delinquent returns. They were not "deficiencies" in tax within the meaning of the statute, and, like the original tax, were collectible by distraint or proceeding in court without the necessity of prior notice of deficiency. The taxes having been paid, moreover, the penalties were collectible "in the same manner as the tax", i.e., by distraint or proceeding in court without the necessity of a prior notice. Accordingly, the limitation imposed by Section 272(a) of the 1939 Code upon the assessment and collection of "deficiencies" in tax is inapplicable here.

The delinquency penalties here involved for 1954 were assessed under Section 6651 of the 1954 Code,

which, unlike Section 291(a) of the 1939 Code relating only to delinquent income tax returns, imposes civil sanctions for delinquencies with respect to a number of taxes, previously imposed under several sections of the 1939 Code. Provisions relating to the assessment and collection of *all* such sanctions imposed under Section 6651 are set out in Section 6659 of the 1954 Code. No distinction is made with respect to civil penalties imposed in connection with income, estate, and gift taxes over which the Tax Court is given jurisdiction. Without distinction, Section 6659 (a) declares that such additions to the tax "shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes". Subsection (b) of Section 6659 of the 1954 Code comprehends, not merely many types of taxes, but also penalties which are to be collected in the course of a deficiency proceeding (see Section 6653) as well as penalties to be collected by assessment without prior deficiency notice (as self-returned taxes are collected). Thus, since Section 6659(b) comprehends both types of proceeding, it includes a parenthetical reference to the deficiency procedure; clearly, however, no direction that this procedure is to be applied under all situations, such as the record state of facts, was intended.

The language employed in Section 6659 of the 1954 Code necessarily differs from the language of Section 291(a) of the 1939 Code because it was framed to include all sanctions imposed under Chapter 68, while Section 291(a) was limited to delinquent income tax returns, but the provisions did not effect any change

in existing law. The delinquency penalties here involved for 1954 having been assessed in connection with the original tax reported on the taxpayers' returns for that year, and no "deficiency" in tax having been determined, the amount in issue "shall be considered a part of such [original] tax for the purpose of applying the provisions" of the 1954 Code "relating to the assessment and collection of such tax". (Section 6659(b).) Since no deficiency in tax was determined, the parenthetical portion of Section 6659 (b) is inapplicable, and assessment and collection of the delinquency penalties in issue for the latter year are not subject to the limitations of Section 6613 of the 1954 Code upon assessment and collection of "deficiencies" in tax.

The decision of the District Court is wrong. Its judgment should be vacated and judgment of dismissal should be directed in favor of the Director.

ARGUMENT

Delinquency Penalties Imposed Under Sections 291(a) Of The Internal Revenue Code Of 1939 And 6651(a) Of The Internal Revenue Code Of 1954 For The Late Filing Of Income Tax Returns May Be Assessed And Collected, As Are The Self-Returned Taxes Reported Upon Such Returns, Without The Prior Issuance Of Ninety-Day Deficiency Letters.

This action was brought to enjoin the collection of amounts assessed under Section 291(a) of the Internal Revenue Code of 1939 and Section 6651(a) of the Internal Revenue Code of 1954 (Appendix, *infra*) as penalties for the late filing of federal income tax returns for the years 1953 and 1954, and to have

such assessments declared void, and the District Court clearly erred as a matter of law in granting the relief prayed for.

Elemental in our system of federal jurisprudence is the principle that equitable relief may not be granted where the plaintiff has a plain, adequate and complete remedy at law, and the injunction herein was improvidently granted for that reason alone, because in this case the plaintiff clearly has a plain, adequate and complete remedy at law by payment of the penalties in issue and suing for a refund,[5] and no allegations or showing to the contrary was made by the plaintiff.

Moreover, Sections 3653(a) of the 1939 Code and 7421(a) of the 1954 Code (Appendix, *infra*) specifically provide that "Except as provided in sections * * *, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court", the excepting sections relied upon here by the District Court being Section 272(a) of the 1939 Code and Section 6213(a) of the 1954 Code (Appendix, *infra*). We submit the instant case does not fall within these statutory exceptions.

The above Sections 3653(a) and 7421(a) were derived from Section 3224 of the Revised Statutes, which latter section was in the nature of a revision of Section 10 of the Act of March 2, 1867, c. 169, 14 Stat. 471, 475, and by its terms admitted of no ex-

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[5] See Sections 322 and 3772 of the Internal Revenue Code of 1939; Sections 6511, 6532, and 7422 of the Internal Revenue Code of 1954.

ception to the prohibition against maintaining a suit to restrain assessment or collection of any federal tax. See *Snyder* v. *Marks*, 109 U.S. 189; *Pacific Whaling Co.* v. *United States*, 187 U.S. 447; *Dodge* v. *Osborn*, 240 U.S. 118; *Bailey* v. *George*, 259 U.S. 16; *Graham* v. *du Pont*, 262 U.S. 234. Despite this unqualified prohibition of the earlier statutes, the courts have recognized that equitable relief occasionally may be justified in exceptional and unusual circumstances (*Miller* v. *Nut Margarine Co.*, 284 U.S. 498), but the fortuitous circumstances that the amount in issue is a civil sanction or penalty, designated an addition to tax by the statute, as here, does not exclude the amount from the strict prohibition of Section 3224 of the Revised Statutes and corresponding provisions of the various later revenue statutes. However, the District Court did not base its determination herein on the ground of exceptional and unusual circumstances, and cases in which injunctive relief was granted on that ground are not helpful at this point.

Instead, the District Court based its judgment herein on an erroneous application of the statutory exception found in the above Sections 272(a) of the 1939 Code and 6213(a) of the 1954 Code to the maintenance of such suits. In its opinion (R. 11-19) filed in connection with the District Director's motion to dismiss for want of jurisdiction (R. 11), the District Court stated (R. 13-15) that the issue involved is whether a delinquency penalty (imposed under Section 291(a) of the 1939 Code and Section 6651(a) of the 1954 Code) is a "deficiency" within the meaning of Section 272(a) of the 1939 Code and/or Sec-

tion 6659 [6] of the 1954 Code; that if such penalties are deficiencies the 90-day letter is required and the injunction prayed for should be granted; and that if the delinquency penalties are not deficiencies there need be no 90-day letter and the injunction prayed for will not lie.

Examination of Section 271(a) of the 1939 Code and Section 6211(a) of the 1954 Code (Appendix, *infra*), defining the term "deficiency" for purposes of Sections 272 of the 1939 Code and Sections 6212 and 6213 of the 1954 Code, clearly indicates that such delinquency penalties, assessed under the circumstances of this case, could not possibly constitute a "deficiency" as therein defined.[7] According to Sections 271(a) and 6211(a), the term "deficiency" as used in the respective statutes, "means" the amount by which the *tax* imposed by the statute [8] exceeds the excess of the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the

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[6] The 1954 Code cognate of 1939 Code Section 272(a) is Section 6213(a). However, as discussed below, the District Court apparently considered Section 6659(b) of the 1954 Code to incorporate the terms of Section 6213(a) by reference.

[7] By using the word "means" Congress intended an exclusive definition of the term "deficiency". See *Groman* v. *Commissioner*, 302 U.S. 82, 86.

[8] The definition is the same in both Codes, except that Section 271 (a) of the 1939 Code applies only to income taxes, the term for estate and gift tax purposes being defined in Sections 870 and 1101, while the definition in Section 6211 of the 1954 Code applies to all three.

amounts previously assessed (or collected without assessment) as a deficiency, over the amount of rebates, as defined in subsection (b)(2) of the respective sections, made by the Commissioner.

The amounts here involved are not *tax* imposed by the respective statutes as that term is used in the above definition. They are amounts imposed by separate provisions of the respective statutes as a civil sanction or penalty for the late filing of an income tax return, and are described in the respective statutes as an addition to the tax. Section 291(a) of the 1939 Code and Section 6651(a) of the 1954 Code. But they are no more tax, at least for purposes of this case, than is the interest imposed by statute for late payment of the tax. Compare *Standard Oil Co.* v. *McMahon*, 244 F. 2d 11, 13 (C.A. 2d), and cases cited.

The term "deficiency" as used in the above sections of the 1939 and 1954 Codes was first written into the Revenue Act of 1924, c. 234, 43 Stat. 253, as Section 273, in conjunction with other related provisions of that Act (Section 900, amended by Section 1000 of the Revenue Act of 1926, c. 27, 44 Stat. 9) creating the Board of Tax Appeals, now the Tax Court, the purpose of which was to provide a ready forum where taxpayers could litigate any *additional* income tax liability claimed by the Commissioner before being required to pay it,[9] and the obvious purpose of defin-

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[9] *Old Colony Tr. Co.* v. *Commissioner*, 279 U.S. 716, 719; *Ventura Consolidated Oil Fields* v. *Rogan*, 86 F. 2d 149 (C.A. 9th), certiorari denied, 300 U.S. 672; *Standard Oil Co.* v. *McMahon*, 244 F. 2d 11 (C.A. 2d); *United States* v. *Curd*

ing the term "deficiency" was to delimit the jurisdiction of the Tax Court.

The existence of a "deficiency" within the meaning of these statutes is essential to the Tax Court's jurisdiction to review a determination of liability by the Commissioner, and the meaning of the term as used in the statutes has been considered in a number of cases. See *Standard Oil Co.* v. *McMahon*, 244 F. 2d 11 (C.A. 2d); *Denton* v. *United States*, 235 F. 2d 733 (C.A. 3d), affirming 132 F. Supp. 741 (N.J.); *Bendheim* v. *Commissioner*, 214 F. 2d 26 (C.A. 2d); *McConkey* v. *Commissioner*, 199 F. 2d 892 (C.A. 4th), certiorari denied, 345 U.S. 924; *United States* v. *Erie Forge Co.*, 191 F. 2d 627 (C.A. 3d), certiorari denied, 343 U.S. 930, rehearing denied, 343 U.S. 970; *Fairbanks' Estate* v. *Commissioner*, 128 F. 2d 537 (C.A. 5th); *Superheater Co.* v. *Commissioner*, 125 F. 2d 514 (C.A. 2d); *Tyson* v. *Commissioner*, 66 F. 2d 160 (C.A. 7th), certiorari denied, 292 U.S. 657; *Uncasville Mfg. Co.* v. *Commissioner*, 55 F. 2d 893 (C.A. 2d), certiorari denied, 286 U.S. 545; *Jackson Iron & Steel Co.* v. *Commissioner*, 54 F. 2d 861 (C.A. 6th), certiorari denied, 286 U.S. 549; *Veeder* v. *Commissioner*, 36 F. 2d 342 (C.A. 7th); *Anderson* v. *Commissioner*, 11 T.C. 841; *Will County Title Co.* v.

(C.A. 5th), decided June 30, 1958 (2 A.F.T.R. 2d 5111); *Flora* v. *United States*, 357 U.S. 63. See H. Rep. No. 179, 68th Cong., 1st Sess., p. 62 (1924) (1939-1 Cum. Bull. (Part 2) 241, 258); S. Rep. No. 398, 68th Cong., 1st Sess., p. 30 (1924) (1939-1 Cum. Bull. (Part 2) 266, 287); H. Rep. No. 1, 69th Cong., 1st Sess., p. 10 (1925) (1939-1 Cum. Bull. (Part 2) 315, 321-322); S. Rep. No. 52, 69th Cong., 1st Sess., pp. 25-28 (1926) (1939-1 Cum. Bull. (Part 2) 332, 351-353).

Commissioner, 38 B.T.A. 1396; 9 Mertens, Law of Federal Income Taxation, Sections 49.10-49.13.

Whether the penalty assessments here involved constitute "deficiencies" within the meaning of the statute, notwithstanding the obvious fact that they are not deficiencies in *tax*, can best be tested in the light of the Tax Court's jurisdiction to review deficiency determinations of the Commissioner. Had the Commissioner determined deficiencies in tax for the years involved, and added delinquency penalties provided by the statutes, the Tax Court obviously would have had jurisdiction to review the Commissioner's determination, both as to the tax and as to the penalty, if a timely petition had been filed with it based upon a statutory notice of such determination. This was the situation in the several cases cited in the opinion of the District Court (R. 18-19),[10] the determination of penalties in those cases being incidental to the determination of deficiencies in tax, which called for issuance of statutory notices of deficiency. The penalties were appropriately included in the deficiency notices, and were properly before the Tax Court for adjudication because the Tax Court

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[10] It is not clear whether the court was associating the factual situation in this case with the factual situation in the cited cases or with the "peculiar factual situation" of *United States* v. *Erie Forge Co.*, 191 F. 2d 627 (C.A. 3d), certiorari denied, 343 U.S. 930, rehearing denied, 343 U.S. 970. However, there was no deficiency in tax in the instant case, which could liken it to the cases cited. On the contrary, as in the *Erie Forge Co.* case, the penalties were based on the tax reported on the delinquent returns, which tax had been paid prior to assessment of the delinquency penalties.

had acquired jurisdiction by reason of the Commissioner's determination of deficiencies in *tax* in those cases. Many other cases of this character could be cited, but they are not determinative of the issue involved in the present proceeding because in none of them did the Tax Court's jurisdiction rest upon the Commissioner's assertion of delinquency penalties as a "deficiency" within the meaning of the statute.

On the other hand, there was no deficiency in *tax* in the instant case.[11] Moreover, the amounts shown as original tax on the delinquent returns had already been paid before the delinquency penalties were assessed. Apparently the Commissioner has never sought by issuance of statutory deficiency notice to collect penalties due under such circumstances. In any event, there is nothing in any of the authorities cited above and we have found none, even remotely suggesting that the Tax Court would have jurisdiction in this case, even if a statutory deficiency notice were issued to the taxpayer. Rather, the contrary seems quite clear.

Since the delinquency penalties here in issue are not "deficiencies" within the meaning of the above statutory definition,[12] the judgment of the District

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[11] The additional amounts collected for 1953 on account of mathematical errors in the returns did not constitute deficiencies in tax within the meaning of the statutory definition and are not in dispute.

[12] *United States* v. *Erie Forge Co.*, 191 F. 2d 627 (C.A. 3d), certiorari denied, 343 U.S. 930, rehearing denied, 343 U.S. 970; *Standard Oil Co.* v. *MaMahon*, 244 F. 2d 11 (C.A. 2d).

Court herein can be justified only if the statutory provisions relating to the *collection* of such delinquency penalties require the Commissioner, under the circumstances of this case, to first issue a deficiency notice, and whether those provisions also give the Tax Court jurisdiction to review the Commissioner's action in assessing them before such penalties can be collected. The provisions applicable here are Section 291(a) of the 1939 Code, applicable to the year 1953, and Section 6659 of the 1954 Code, applicable to the year 1954. As to the year 1953, Section 291(a) provides that the delinquency penalty imposed by that section—

> * * * shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. * * *

This language is clear. If the delinquency penalty imposed under that section is added to a "deficiency" in tax, it is to be collected "at the same time and in the same manner and as a part of" the deficiency, as in the cases cited by the District Court (R. 18-19), again, if the deficiency in tax is paid before the neglect is discovered, then the delinquency penalty would be collected "in the same manner as" the tax upon which it is based, that is, by deficiency procedure. Compare *McLaughlin* v. *Commissioner*, 29 B.T.A. 247 and *Middleton* v. *Commissioner*, 200 F. 2d 94 (C. A. 5th), dealing with fraud penalties imposed under another section of the 1939 Code, which are to be collected "in the same manner" as the deficiencies on which they are based. On the other hand,

where there is no deficiency and the delinquency penalty is added to the original tax reported on the return, as in the instant case, then whether or not the delinquent tax has already been paid, the penalty "shall be collected in the same manner as the tax." Since the tax shown on the return can only be collected by distraint or by a proceeding in court (and not by issuance of what purported to be a deficiency notice because the Tax Court would not have jurisdiction),[13] the delinquency penalty can only be collected in the same manner. *United States* v. *Erie Forge Co.*, 191 F. 2d 627 (C.A. 3d), certiorari denied, 343 U.S. 930, rehearing denied, 343 U.S. 970. Compare *Standard Oil Co.* v. *McMahon*, 244 F. 2d 11 (C.A. 2d); *United States* v. *Curd* (C.A. 5th), decided June 30, 1958 (2 A.F.T.R. 2d 5111). Accordingly, not only was a deficiency notice not required in the instant case, but it would have been a useless gesture on the part of the Commissioner, for it could not give the Tax Court jurisdiction and the District Court clearly erred in enjoining collection on the ground that deficiency notices had not been issued.

In its opinion on the Director's motion to dismiss, the District Court admitted that the above language of the 1939 Code "would strongly indicate that a penalty under section 291 would not be a 'deficiency' ", but by a process of reasoning which we submit was unsound the court concluded, "when read in connection with the 1954 Code, a doubt clearly arises as to the legislative intent" with respect to the 1939 Code.

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[13] Compare *McConkey* v. *Commissioner*, 199 F. 2d 892 (C. A. 4th), certiorari denied, 345 U. S. 924.

(R. 16.) Earlier in its opinion, after quoting the above language of the 1939 Code, the District Court stated (R. 15): "However, in the 1954 Code this language was carried over in Section 6659 (see footnote 4) *but with the additional language that clearly states that any addition to tax under Section 6651 shall be considered a deficiency*". (Italics supplied.) We are not told specifically what "additional language" in Section 6659 (applicable in the instant case for the year 1954), the court had in mind, but surely the language of that section does not warrant the construction that "any addition to tax" under Section 6651 "shall be considered a deficiency". Moreover, there is nothing in that section or its legislative history which could give rise to any doubt as to the legislative intent in enacting Section 291(a) of the 1939 Code—or, for that matter, any doubt as to the legislative intent in enacting Section 6659 of the 1954 Code.

The language of Section 6659 differs from the language of Section 291, but the 1954 Code did not effect any change in law so far as the instant case is concerned. The change in language resulted from changes in codification of the internal revenue laws. Application of Section 291 of the 1939 Code was limited to cases of failure to file a timely return "required by this chapter", being Chapter 1, dealing with income taxes,[14] while Sections 6651 and 6659 of the

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[14] Section 291 was made applicable to the additional income tax imposed under Chapter 2 of the 1939 Code by Section 508, while the delinquency penalty imposed by Section 3612(d)(1) of the 1939 Code were made applicable to estate and gift taxes by Sections 894 and 1018 of the 1939 Code.

1954 Code are a codification of many of the penalty provisions found in the 1939 Code.[15] Section 6659, entitled "Applicable Rules", is the concluding section of Subchapter A, Chapter 68, of the 1954 Code. Chapter 68 is entitled "Additions to the Tax, Additional Amounts, and Assessable Penalties". Subchapter A (Sections 6651-6659) deals with additions to the tax and additional amounts, while Subchapter B (Sections 6671-6675) deals with assessable penalties.

The first section of Subchapter A (Section 6651), under which the delinquency penalties for 1954 were assessed in this case, imposes such penalties for failure to file timely returns, declarations, statements, etc., including income tax returns as required by Subchapter A of Chapter 61 (other than part III thereof, dealing with information concerning persons subject to special provisions, transactions with other persons, and information regarding wages paid to employees); for failure to file timely returns as required by Subchapter A of Chapter 51 relating to distilled spirits, wines and beer; for failure to file timely returns as required by Subchapter A of Chapter 52, relating to tobacco, cigars, cigarettes, and cigarette papers and tubes; and for failure to file timely returns as required by Subchapter A of Chapter 53, relating to machine guns and certain other firearms. Other sections of Subchapter A, Chapter 68, including Section 6653 imposing civil negligence and fraud penalties with respect to underpayments of tax, are not directly

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[15] For instance, Sections 51(g)(6), 291, 293, 871(i), 1019, 1117(g), 1634(b), 1718(c), 1821(a)(3), 3310(a) through (e), 3311, 3655(a) and (b) of the 1939 Code.

relevant here, but with respect to all of the enumerated sanctions subsection (a) of Section 6659 provides:

> (a) *Additions Treated as Tax.*—Except as otherwise provided in this title—
>
> (1) The additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes;
>
> (2) Any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter.

As pointed out above, in Subchapter A of Chapter 68 Congress has collected provisions scattered throughout the 1939 Code imposing civil sanctions for delinquency, negligence and fraud,[16] in addition to the provisions imposing sanctions for delinquency, negligence, and fraud in the filing of income, estate and gift tax returns over which the Tax Court is given jurisdiction in case of a deficiency determination by the Commissioner. But no distinction is made in the above quoted subsection with respect to the latter, the subsection merely providing that all of the enumerated civil sanctions "shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes". This subsection did not purport to effect any change in existing law, and there is nothing in the subsection to support the

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[16] See fn. 15, *supra*.

statement of the District Court (R. 15) that the "additional language" in Section 6659 "clearly states that any addition to tax under Section 6651 shall be considered a deficiency".

While we are not advised what "additional language" the District Court had in mind, the reference probably was to subsection (b) of Section 6659, which provides that—

> Any addition under section 6651 or section 6653 to a tax imposed by another subtitle of this title *shall be considered a part of such tax for the purpose of applying the provisions of this title relating to the assessment and collection of such tax* (including the provisions of subchapter B of chapter 63, relating to deficiency procedures for income, estate, and gift taxes). [Italics supplied.]

This subsection was cast in broader language than Section 291(a) of the 1939 Code to cover additions to taxes other than additions for the late filing of income tax returns, and like subsection (a) it makes no distinction with respect to the various categories of taxes to which sanctions may be added, the provision that any addition to tax under those sections "shall be considered a part of such tax for the purpose of applying the provisions of this title relating to the assessment and collection of such tax" applying alike to all of the enumerated categories to tax. Neither the language just quoted nor the further parenthetical provision that any addition shall be considered as a part of the tax for the purpose of applying the assessment and collection provisions of the statute "(including the provisions of subchapter B

of chapter 63, relating to deficiency procedures for income, estate, and gift taxes)" is susceptible of the interpretation placed upon Section 6659 by the District Court. There is nothing in this subsection stating that "any addition to tax under Section 6651 shall be considered a deficiency". (R. 15.)

Moreover, instead of casting doubt on the legislative intent as reflected in Section 291(a) of the 1939 Code, Section 6659 of the 1954 Code accomplishes the same purpose in language which emphasizes the fact that the delinquency penalty is on the same footing as the tax with respect to which it is imposed so far as assessment and collection procedures are concerned. If the penalty is assessed in connection with a tax other than an income, estate, or gift tax it is subject to assessment and collection procedures applicable to such taxes. If the penalty is assessed in connection with an original income, estate, or gift tax reported on the return, as in the instant case, and no deficiency in tax is involved, it is subject to the assessment and collection procedures applicable to such original tax. Only when the penalty is asserted in connection with a deficiency in tax (limited to income, estate, and gift taxes) are the deficiency procedures for assessment and collection applicable to the penalty, and it is only in such situations that the limitations upon assessment and collection provided in Sections 272(a) of the 1939 Code and 6213(a) of the 1954 Code may be invoked. In neither situation would the fact that the tax (or deficiency) had been paid before the penalty was asserted alter the Commissioner's remedy for collecting the penalty. *United States* v. *Erie Forge Co.*, 191 F. 2d 627 (C.A. 3d), certiorari denied,

343 U.S. 930, rehearing denied 343 U.S. 970; *Middleton* v. *Commissioner*, 200 F. 2d 94 (C.A. 5th). Compare *Standard Oil Co.* v. *McMahon*, 244 F. 2d 11 (C.A. 2d).

That Congress intended no change in existing law when it adopted Section 6659 of the 1954 Code is made clear in the Committee reports accompanying the legislation. The reports of both the Committee on Ways and Means of the House [17] and the Committee on Finance of the Senate [18] contain the following explanation of Section 6659: [19]

> This section provides that the additions to the tax, additional amounts, and penalties provided by chapter 68 shall be assessed, collected, and paid in the same manner as taxes, *except where otherwise specifically provided in another section of this title. This conforms to the rules under existing law.* By virtue of this section, it is unnecessary in other parts of the title to specifically refer to these additions to the tax when providing rules as to collection, assessment, etc., of taxes. This section also makes clear that the procedures for the assessment of deficiencies in

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[17] H. Rep. No. 1337, 83d Cong., 2d Sess., p. A420 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4568).

[18] S. Rep. No. 1622, 83d Cong., 2d Sess., p. 595 (3 U.S.C. Cong. & Adm. News (1954) 4621, 5245).

[19] After erroneously holding that the penalties here involved for 1954 were "deficiencies" within the meaning of the 1954 Code, the District Court pointed to the Committee statements that Section 6659 did not effect any change in existing law and held that therefore the 1953 penalties were "deficiencies" under the 1939 Code. (R. 17-19.)

> income, estate, and gift taxes (including 90-da
> letters and appeal to the Tax Court) also appl
> to additions to those taxes. (Italics supplied.)

Moreover, the foregoing interpretation is in accor
with the Treasury Regulations under Section 6659 c
the 1954 Code. See Section 301.6659-1, adopted No
vember 16, 1957 (Appendix, *infra*), which was no
available to the court below when it rendered it
opinion.

Furthermore, the District Court stated (R. 19)–

> * * * this Court feels that the plaintiffs ar
> entitled to an administrative determination a
> to whether or not their failure to file a timel
> tax return was "due to reasonable cause and no
> due to wilful neglect."

While the Commissioner had afforded taxpayer suc
administrative determination, the District Court un
doubtedly was making reference to review by the Ta
Court, defined by the Code as an independent agenc
in the Executive Branch of the Government (Sectio
7441, Internal Revenue Code of 1954). To this
may be answered that taxpayer may obtain judicia
review of the Commissioner's determination throug
a refund suit and that Congress plainly did not in
tend that an independent Tax Court review of th
imposition of the penalty should be allowed in a situ
ation arising under Sections 291(a) and 6651(a)
where the correctness of the tax itself was not i
question and had been self-returned.

The decision in *Davis* v. *Dudley*, 124 F. Supp. 42
(W.D. Pa.), cited by the District Court (R. 16),
not in point here. That case involved additions to ta
imposed under Section 294(d) of the 1939 Code, cor

sisting of (1) ad valorem penalties for failure to file timely declarations of estimated tax, (2) ad valorem penalties for failure to pay within the time prescribed installments of declared estimated tax, and (3) ad valorem penalties for substantial underestimates of estimated tax. The court there pointed out that Section 294(d) omitted the statutory language employed in Sections 291 and 293 of the 1939 Code which was construed and contrasted in *United States* v. *Erie Forge Co.*, *supra*, Moreover, the report of the *Davis* case does not indicate whether the penalties involved were asserted in connection with the Commissioner's determination of a deficiency in tax which was not contested, which would bring it within the rule of *Middleton* v. *Commissioner*, *supra*. Furthermore, the footnote to the *Davis* opinion (p. 429) quoted by Districe Court (R. 16-17), in addition to being dictum, reflects a misunderstanding of the provisions of Section 6659 of the 1954 Code.

On the other hand, we submit the instant case is indistinguishable from *United States* v. *Erie Forge Co.*, *supra*, which the District Court apparently refused to accept. (R. 15-19.) That case properly construes Section 291 of the 1939 Code, and since Section 6659 of the 1954 Code made no change in existing law, its holding applies equally to both taxable years involved in the instant case. There the Court of Appeals pointed out, in line with the foregoing discussion, that the language of Section 271(a) of the 1939 Code defining the term "deficiency" "precludes delinquency penalties assessed under Section 291 for the late filing of returns from being included in the term 'deficiency'" (191 F. 2d, p. 630). The court

then went on to demonstrate that since Secti
291(a) provides that the penalty shall be collect
"in the same manner" as the tax, the right to a
ficiency notice depended upon the "manner" in whi
the tax is to be collected, stating (191 F. 2d,
630-631):

> The "manner" prescribed by the Code for t
> collection of a self-returned tax is by assessme
> by the Commissioner certified to the Collect
> due notice to the taxpayer, and collection, eith
> by distraint or by a proceeding in court such
> this. By contrast, Section 293, entitled "Ad
> tions to the tax in case of deficiency", provid
> that *deficiency* penalties are to be "assessed, c
> lected, and paid in the same manner as if (the
> were * * * deficienc(ies) * * *." The "manne
> prescribed for the collection of deficiencies is
> statutory notice of the deficiency, after which t
> taxpayer has ninety days before the deficien
> can be assessed in which to petition the T
> Court for a redetermination. Thus, the Co
> logically provides that where the penalty is mea
> ured by a tax deficiency it is subject to the sa
> procedure as the deficiency, for if the deficien
> is revised by the Tax Court the penalty will
> revised along with it. However, where the pe
> alty is based upon an amount which the ta
> payer has admitted to be due, the Code prescrib
> the simpler method of collection first outlined. T
> difference in wording between Sections 291 a
> 293 is certainly not accidental. If Congress h
> meant to subject delinquency penalties to t
> deficiency route it would undoubtedly have sa
> so, just as it did in Section 293 in the case
> deficiency penalties. But the words "in the sa
> manner * * * as * * * the tax" in Section 2

admit of but one meaning. If self-returned taxes are collected without the issuance of ninety-day letters, if follows *simpliciter* that none are required for delinquency penalties measured thereon.

Newsom v. *Commissioner*, 22 T.C. 225, affirmed, *per curiam*, 219 F. 2d 444 (C.A. 5th), upon which the District Court relied in the *Davis* case, *supra*, dealt—as did the *Davis* case—with entirely different statutory language from that involved here and in *Erie Forge Co.* Indeed, the Tax Court expressly recognized this ground of distinction from *Erie Forge Co.* in the *Newsom* case, 22 T.C., p. 227. The court below also refers to *Washburn* v. *Commissioner*, 7 B.T.A. 483. (R. 15.) But in the *Erie Forge Co.* case, 191 F. 2d, p. 631, the Third Circuit challenged the correctness of the Board's holding there, as the Tax Court also noted in the *Newsom* case (p. 227). Moreover, the facts in the *Washburn* case are unclear as well as the ground for decision and, although the *Washburn* opinion was rendered in 1927, it has never been cited for the proposition here under discussion, as the Third Circuit pointed out in *Erie Forge Co.*, *supra*, p. 631.

Not only is the decision of the District Court clearly wrong as a matter of law, but to allow it to stand would seriously hamper the prompt collection of taxes. Delinquency penalties such as here involved have been a part of our internal revenue system since early times,[23] the obvious purpose of such provisions being

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[23] See Section 3176 of the Revised Statutes and the Acts from which it was derived.

to facilitate prompt and orderly collection of the revenue. The purpose of the present statute imposing such penalties would be largely defeated, and taxpayer could delay filing returns showing taxes admittedly due with comparative immunity if the Commissioner can be forced to submit to delays incident to the ninety-day letter and deficiency procedures in order to collect delinquency penalties asserted under the circumstances of the case here under review. Where the penalty is based upon an amount of tax which taxpayer has admitted to be due and where such self-returned taxes are collected without the issuance of ninety-day letters, it follows that no such letters are intended to be required for delinquency penalties measured by those taxes.

CONCLUSION

The decision of the District Court is wrong, the judgment of the District Court should be vacated and set aside and judgment directed dismissing the complaint.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1939:

SEC. 271 [As amended by Sec. 14(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. DEFINITION OF DEFICIENCY.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

* * * *

(26 U.S.C. 1952 ed., Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) *Petition to Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the

deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address.

* * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 291. [As amended by Sec. 172(f), Revenue Act of 1942, c. 619, 56 Stat. 798]. FAILURE TO FILE RETURN.

(a) In case of any failure to make and file return required by this chapter, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the tax: 5 per centum if the failure is for not more than thirty days with an additional 5 per

centum for each additional thirty days or fraction thereof during which such failure continues, not exceeding 25 per centum in the aggregate. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3612(d)(1).

* * * *

(26 U.S.C. 1952 ed., Sec. 291.)

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 272 (a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * *

(26 U.S.C. 1952 ed., Sec. 3653.)

Internal Revenue Code of 1954:

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) *In General.*—For purposes of this title in the case of income, estate, and gift taxes, imposed by subtitles A and B, the term "deficiency" means the amount by which the tax imposed by subtitles A or B exceeds the excess of—

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a re-

turn was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6211.)

SEC. 6212. NOTICE OF DEFICIENCY.

(a) *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail.

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted

until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6213.)

SEC. 6651. FAILURE TO FILE TAX RETURN.

(a) *Addition to the Tax.*—In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6651.)

SEC. 6659. APPLICABLE RULES.

(a) *Additions Treated as Tax.*—Except as otherwise provided in this title—

(1) The additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes;

(2) Any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter.

(b) *Additions to Tax for Failure to File Return or Pay Tax.*—Any addition under section 6651 or section 6653 to a tax imposed by another subtitle of this title shall be considered a part of such tax for the purpose of applying the provisions of this title relating to the assessment and collection of such tax (including the provisions of subchapter B of chapter 63, relating to deficiency procedures for income, estate, and gift taxes).

(26 U.S.C. 1952 ed., Supp. II, Sec. 6659.)

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7421.)

Treasury Regulations on Additions to the Tax, Additional Amounts, and Assessable Penalties (1954 Code):

Section 301.6659-1 *Applicable Rules.*—(a) *Additions treated as tax.*—Except as otherwise provided in the Code, any reference in the Code to "tax" shall be deemed also to be a reference to any addition to the tax, additional amount, or penalty imposed by chapter 68 with respect to such tax. Such additions to the tax, additional amounts, and penalties shall become payable upon notice and demand therefor and shall be assessed, collected, and paid in the same manner as taxes.

(b) *Additions to tax for failure to file return or pay tax.*—Any addition under section 6651 or section 6653 to a tax shall be considered a part of such tax for the purpose of the assessment and collection of such tax. For applicability of deficiency procedures to additions to the tax, see paragraph (c) of this section.

(c) *Deficiency procedures.*—(1) *Additions to the tax for failure to file tax return.*—Subchapter B or chapter 63 (deficiency procedures) applies to the additions to the income, estate, and gift taxes imposed by section 6651 for failure to file a tax return to the same extent that it applies to such taxes. Accordingly, if there is a deficiency (as defined in section 6211) in the tax (apart from the addition to the tax) where a return has not been timely filed, deficiency procedures apply to the addition to the tax under section 6651. If there is no deficiency in the tax where a return has not been timely filed, the addition to the tax under section 6651 may be assessed and collected without deficiency proced-

ures. The provisions of this subparagraph may be illustrated by the following examples:

Example (1). A filed his income tax return for the calendar year 1955 on May 15, 1956, not having been granted an extension of time for such filing. His failure to file on time was not due to reasonable cause. The return showed a liability of $1,000 and it was determined that A is liable under section 6651 for an addition to such tax of $50 (5 percent a month for 1 month). The provisions of subchapter B of chapter 63 (deficiency procedures) do not apply to the assessment and collection of the addition to the tax since such provisions are not applicable to the tax with respect to which such addition was asserted, there being no statutory deficiency for purposes of section 6211.

Example (2). Assume the same facts as in example (1) and assume further that a deficiency of $500 in tax and a further $25 addition to the tax under section 6651 is asserted against A for the calendar year 1955. Thus, the total addition to the tax under section 6651 is $75. Since the provisions of subchapter B of chapter 63 are applicable to the $500 deficiency, they likewise apply to the $25 addition to the tax asserted with respect to such deficiency (but not to the $50 addition to the tax under example (1)).

(2) *Additions to the tax for negligence or fraud.*—Subchapter B of chapter 63 (deficiency procedures) applies to all additions to the income, estate, and gift taxes imposed by section 6653(a) and (b) for negligence and fraud.

(3) *Additions to tax for failure to pay estimated income taxes.*—(i) *Return filed by taxpayer.*—The addition to the tax for underpay-

ment of estimated income tax imposed by section 6654 (relating to failure by individuals to pay estimated income tax) or section 6655 (relating to failure by corporations to pay estimated income tax) is determined by reference to the tax shown on the return if a return is filed. Therefore, such addition may be assessed and collected without regard to the provisions of subchapter B of chapter 63 (deficiency procedures) if a return is filed since such provisions are not applicable to the assessment of the tax shown on the return. Further, since the additions to the tax imposed by section 6654 or 6655 are determined solely by reference to the amount of tax shown on the return if a return is filed, the assertion of a deficiency with respect to any tax not shown on such return will not make the provisions of subchapter B of chapter 63 (deficiency procedures) apply to the assessment and collection of any additions to the tax under section 6654 or 6655.

(ii) *No return filed by taxpayer.*—If the taxpayer has not filed a return and his entire income tax liability is asserted as a deficiency to which the provisions of subchapter B of chapter 63 apply, such provisions likewise will apply to any addition to such tax imposed by section 6654 or 6655.

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